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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAYSON MAGLAYA,
Petitioner,
v.
PEOPLE OF THE STATE OF
CALIFORNIA,
Respondent.

No. 2:16-cv-02694-TLN-CKD P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se in this habeas corpus action filed pursuant to 28 U.S.C. § 2254. Respondent has answered the first amended habeas petition, ECF No. 18, and petitioner has filed a traverse. ECF Nos. 27-28. Upon careful consideration of the record and the applicable law, the undersigned recommends that the petition be denied for the reasons explained below.

I. Factual and Procedural Background

Following a jury trial in the Nevada County Superior Court, petitioner was convicted of attempted murder and assault with a deadly weapon. Petitioner was sentenced to 28 years to life in prison based on the jury’s findings that he had two prior serious or violent felony convictions. The California Court of Appeal affirmed petitioner’s convictions on May 26, 2015. State Lodged Document No. 10 (direct appeal opinion). Petitioner did not file any state habeas corpus petitions before filing the present § 2254 action in this court.

1 In affirming the judgment on appeal, the California Court of Appeal, Third Appellate
2 District, summarized the facts as follows:¹

3 Petitioner² worked as a produce clerk and bagger for a
4 grocery store in July 2012. The grocery store issued him a box cutter
in connection with his duties.

5 On July 15, 2012, the grocery store suspended petitioner due
6 to an incident in the store. Later that day, petitioner saw an
7 acquaintance named Joshua Kelgard at a shopping center. The two
8 spoke cordially for a few minutes, but Kelgard was uncomfortable
9 because he was a protected party in a restraining order against
defendant. Kelgard's ex-wife, who was involved in a relationship
with petitioner's brother at the time, had filed for the restraining
order three to four years earlier. Petitioner and Kelgard ended their
conversation, shook hands, and parted ways.

10 Kelgard met his friend Ashley Nachand and they walked to
11 get something to eat. As Kelgard and Nachand stood next to each
12 other at a deli counter, petitioner approached them from behind,
13 stepped between them, put his hand on Kelgard's left shoulder, and
used a sharp instrument to strike him in the chest and face. Kelgard
ran away from petitioner and petitioner fled the grocery store.

14 The treating physician testified that Kelgard suffered a
15 circular stab wound to his chest and a laceration to his face. The
16 chest wound had clean margins and no bruising. The wound had
17 characteristics of a penetrating injury from a sharp object. The face
18 wound was linear with no oozing. Either wound could have been
life-threatening if it had penetrated deeper into the body. The injuries
were not consistent with being punched, and it was unlikely that the
injuries were caused by keys or a credit card. No stabbing instrument
was ever recovered.

19 That evening, police officers found petitioner hiding
20 underneath his stepfather's deck and arrested him. Petitioner
spontaneously stated, "I did not stab anyone."

21 Against the advice of counsel, petitioner testified that he did
22 not remember going to the grocery store on the day of the incident or
trying to stab Kelgard. Petitioner said he liked Kelgard and had no
intention of killing him. Petitioner denied carrying a box cutter.

23 Petitioner said that at the time of the stabbing he was paranoid
24 and believed that his parents were poisoning his food. He said he
25 observed unplugged electrical devices turning on in his presence,
experienced a high-pitched ringing in his ears that may have been

26 ¹ These factual findings are entitled to a presumption of correctness pursuant to 28 U.S.C. §
27 2254(e)(1). However, the court has independently reviewed the record and concluded that there
is nothing to rebut this presumption of correctness in this case.

28 ² All references to "appellant" in the state court opinion have been changed to "petitioner" to
reflect the current case status.

1 caused by sensitivity to electricity, noticed the presence of
2 'condensed energy' in his neighborhood, perceived people acting in
3 a threatening manner towards him, and perceived that people in the
4 community were communicating in code. Petitioner deciphered the
code by assigning numerical values to letters of the alphabet.
Petitioner thought Kelgard and his friends may have been threatening
him because they had put the restraining order on him.

5 During closing argument, the prosecutor stated: 'I talked
6 briefly in the beginning about concept [sic] of reasonable doubt, as
7 well as the judge's instructions, boiled down is reasonable equals
8 reason. Again, it does not mean beyond all doubt, it's a doubt with
a reason you can attach to it. It's a reason you can explain to your
fellow jurors and you can all agree on.' Defense counsel did not
object.

9 Then, during defense counsel's closing argument, defense
10 counsel addressed the absence of a weapon: 'I think we can take a
11 look at the evidence and look at it really closely and you will find
12 there wasn't much in the way of a weapon there; that it probably, in
13 fact, was the box cutter that I held up. That there was a big knife
14 there, no one found a knife, no one saw a knife, no one testified that
they saw him throw a knife away, anything like that. [¶] Officers
looked around his house, they looked in the vicinity, they said they
looked in the bushes, no one found a sharp-edge weapon or anything
like that. [¶] I simply can't believe that my client was attempting to
kill Mr. Kelgard.'

15 In his closing summation, the prosecutor responded: 'The
16 next thing [defense counsel] also decided to talk about was box
17 cutters, not much of a weapon. [¶] Do you remember 9-11? Box
18 cutters were on that plane and yet the whole plane of people did not
19 stop there [sic]. [¶] ... I want you to look at the photos of the
[location] where the blood trail leads out and the trail of blood at the
very end. You have to ask yourself, at that point, is it not reasonable
to think that a sharp object is not used? I say that it's not.' Again,
defense counsel did not object.

20 Then, when the prosecutor turned to a different subject,
21 defense counsel objected and the trial court stated: 'Did I mention
22 objections during closing arguments? Let's let him finish and if
that's an issue, we'll deal with it.' No objections were made at the
conclusion of the closing arguments.

23 **II. Amended Federal Habeas Petition**

24 In his amended federal habeas application, petitioner raises two prosecutorial misconduct
25 claims that occurred during closing argument to the jury. First, petitioner contends that the
26 prosecutor misrepresented the reasonable doubt standard to the jury. Second, petitioner asserts
27 that the prosecutor inflamed the passions of the jury by referring to the use of box cutters during
28 the September 11, 2001 attacks. Because petitioner's defense counsel failed to object to either

1 comment by the prosecutor, petitioner also asserts that his trial attorney was ineffective and that
2 any procedural default of his prosecutorial misconduct claims should be excused on this basis. It
3 is not clear to the court whether petitioner raises the ineffective assistance of counsel as a free-
4 standing claim for relief or just as a basis to excuse his procedural default. Liberally construing
5 petitioner's claims, the court will review the ineffectiveness challenge as a free-standing claim for
6 relief as well as a basis to excuse petitioner's procedural default.

7 **III. Legal Standards**

8 **A. Federal Habeas Corpus Standard**

9 An application for a writ of habeas corpus by a person in custody pursuant to a state court
10 judgment can be granted only for violations of the Constitution or laws of the United States. 28
11 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
12 application of state law. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010); Estelle v. McGuire, 502
13 U.S. 62, 67-68 (1991); Park v. California, 202 F.2d 1146, 1149 (9th Cir. 2000).
14 Title 28 U.S.C. § 2254(d) sets forth the following limitation on the granting of federal habeas
15 corpus relief:

16 An application for a writ of habeas corpus on behalf of a person in
17 custody pursuant to the judgment of a State court shall not be granted
18 with respect to any claim that was adjudicated on the merits in State
court proceedings unless the adjudication of the claim-

19 (1) resulted in a decision that was contrary to, or involved an
20 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

21 (2) resulted in a decision that was based on an unreasonable
22 determination of the facts in light of the evidence presented in the
State court proceeding.

23 The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are different, as the
24 Supreme Court has explained:

25 A federal habeas court may issue the writ under the "contrary to"
26 clause if the state court applies a rule different from the governing
27 law set forth in our cases, or if it decides a case differently than we
28 have done on a set of materially indistinguishable facts. The court
may grant relief under the "unreasonable application" clause if the
state court correctly identifies the governing legal principle from our
decisions but unreasonably applies it to the facts of the particular
case. The focus of the latter inquiry is on whether the state court's

1 application of clearly established federal law is objectively
2 unreasonable, and we stressed in Williams v. Taylor, 529 U.S. 362
3 (2000)] that an unreasonable application is different from an
incorrect one.

4 Bell v. Cone, 535 U.S. 685, 694 (2002). “A state court's determination that a claim lacks merit
5 precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of
6 the state court's decision.” Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough
7 v. Alvarado, 541 U.S. 652, 664 (2004)). Accordingly, “[a]s a condition for obtaining habeas
8 corpus from a federal court, a state prisoner must show that the state court's ruling on the claim
9 being presented in federal court was so lacking in justification that there was an error well
10 understood and comprehended in existing law beyond any possibility for fairminded
11 disagreement.” Richter, 562 U.S. at 103.

12 Relief is also available under the AEDPA where the state court predicates its adjudication
13 of a claim on an unreasonable factual determination. 28 U.S.C. § 2254(d)(2). The statute
14 explicitly limits this inquiry to the evidence that was before the state court. See also Cullen v.
15 Pinholster, 563 U.S. 170 (2011). Under § 2254(d)(2), factual findings of a state court are
16 presumed to be correct subject only to a review of the record which demonstrates that the factual
17 finding(s) “resulted in a decision that was based on an unreasonable determination of the facts in
18 light of the evidence presented in the state court proceeding.” It makes no sense to interpret
19 “unreasonable” in § 2254(d)(2) in a manner different from that same word as it appears in
20 § 2254(d)(1) – i.e., the factual error must be so apparent that “fairminded jurists” examining the
21 same record could not abide by the state court factual determination. Therefore, a petitioner must
22 show clearly and convincingly that the factual determination is unreasonable. See Rice v.
23 Collins, 546 U.S. 333, 338 (2006).

24 The court looks to the last reasoned state court decision as the basis for the state court
25 judgment. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). The petitioner bears “the burden to
26 demonstrate that ‘there was no reasonable basis for the state court to deny relief.’” Walker v.
27 Martel, 709 F.3d 925, 939 (9th Cir. 2013) (quoting Richter, 562 U.S. at 98).

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1 **B. Prosecutorial Misconduct**

2 A defendant’s due process rights are violated when a prosecutor’s misconduct renders his
3 or her trial “fundamentally unfair.” Darden v. Wainwright, 477 U.S. 168, 181 (1986). In the
4 context of closing arguments, the Supreme Court has held that it “is not enough that the
5 prosecutors' remarks [be] undesirable or even universally condemned.” Darden, 477 U.S. at 181.
6 Rather, the improper comments must have “so infected the trial with unfairness as to make the
7 resulting conviction a denial of due process.” Id.

8 **C. Ineffective Assistance of Counsel**

9 The two prong Strickland standard governing ineffective assistance of counsel claims is
10 well known and oft-cited. Strickland v. Washington, 466 U.S. 668 (1984). It requires petitioner
11 to establish (1) that counsel’s representation fell below an objective standard of reasonableness;
12 and, (2) that counsel’s deficient performance prejudiced the defense. Strickland, 466 U.S. at 692,
13 694. “The question is whether an attorney's representation amounted to deficient performance
14 under ‘prevailing professional norms,’ not whether it deviated from best practices or most
15 common custom.” Harrington v. Richter, 562 U.S. 86, 105 (2011) (citing Strickland, 466 U.S. at
16 690). Prejudice is found where “there is a reasonable probability that, but for counsel's
17 unprofessional errors, the result of the proceeding would have been different. A reasonable
18 probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466
19 U.S. at 693. “That requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.”
20 Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (quoting Richter, 562 U.S. 86, 111-12 (2011)).

21 In reviewing a Strickland claim under the AEDPA, the federal court is “doubly
22 deferential” in determining whether counsel’s challenged conduct was deficient. “When §
23 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is
24 whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.”
25 Harrington, 562 U.S. 86, 105 (2011).

26 **D. Procedural Default**

27 The procedural default doctrine forecloses federal review of a state prisoner’s federal
28 habeas claims if those claims were defaulted in state court pursuant to an independent and

1 adequate state procedural rule. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991).
2 Generally, “federal habeas relief will be unavailable when (1) ‘a state court [has] declined to
3 address a prisoner’s federal claims because the prisoner had failed to meet a state procedural
4 requirement,’ and (2) ‘the state judgment rests on independent and adequate state procedural
5 grounds,’” Walker v. Martin, 562 U.S. 307, 316 (2011) (quoting Coleman, 501 U.S. at 729-30).
6 A state procedural rule is “adequate” only if it is clear, consistently applied, and well established
7 at the time of petitioner’s default. Walker, 562 U.S. at 316; Calderon v. United States Dist.
8 Court, 96 F.3d 1126, 1129 (1996). The respondent bears the burden of proof with respect to the
9 “adequacy” of a state procedural bar. Bennett v. Mueller, 322 F.3d 573, 585-86 (9th Cir. 2003).
10 “[A] procedural default does not bar consideration of a federal claim on either direct or habeas
11 review unless the last state court rendering a judgment in the case ‘clearly and expressly’ states
12 that its judgment rests on a state procedural bar.” Harris v. Reed, 489 U.S. 255, 263 (1989).
13 Furthermore, a federal habeas court may still consider the merits of an otherwise procedurally
14 defaulted claim if the petitioner successfully makes a showing of “cause” and “prejudice” or that
15 a fundamental miscarriage of justice will result. See Martinez v. Ryan, 566 U.S. 1, 10-11 (2012)
16 (“A prisoner may obtain federal review of a defaulted claim by showing cause for the default and
17 prejudice from a violation of federal law.”); Coleman, 501 U.S. at 750.

18 **IV. Analysis**

19 In this case, the last reasoned state court decision addressing petitioner’s prosecutorial
20 misconduct claims applied a state procedural rule to bar review. See ECF No. 10 at 8-10. The
21 California Court of Appeal found the claims forfeited for failing to object to them at trial after
22 finding that in both instances an objection was not a futile act. Id. California’s rule requiring a
23 contemporaneous objection to preserve issues for appeal has been deemed to be independent and
24 adequate to bar federal review of constitutional claims. See Fairbank v. Ayers, 650 F.3d 1243,
25 1256-57 (9th Cir. 2011) (finding that California’s contemporaneous objection rule was
26 independent and adequate to bar federal review when a defense attorney failed to object to alleged
27 prosecutorial misconduct). Respondent has therefore met its burden of proving a state court rule
28 barring review of the prosecutorial misconduct claims. See Bennett v. Mueller, 322 F.3d 573,

1 585-86 (9th Cir. 2003) (adopting a burden shifting approach to reviewing procedural default
2 issues). Petitioner does not challenge the independence or adequacy of California’s
3 contemporaneous objection rule. Accordingly, petitioner’s prosecutorial misconduct claims are
4 procedurally defaulted and this court may not reach the merits unless there is cause for the default
5 and prejudice resulting from the constitutional violation. See Coleman v. Thompson, 501 U.S. at
6 750; Martinez, 566 U.S. 1, 10-11.

7 In this case, petitioner argues that the procedural default should be excused based on the
8 ineffectiveness of his trial attorney for failing to object. To establish ineffective assistance,
9 petitioner has to demonstrate that his trial attorney’s failure constituted both deficient
10 performance and resulted in prejudice. See Strickland v. Washington, 466 U.S. 668 (1984). “An
11 ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and
12 raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous
13 care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right
14 to counsel is meant to serve....” Harrington v. Richter, 562 U.S. at 105 (2011). Even assuming
15 counsel’s performance was deficient, there is no prejudice resulting from the challenged conduct.
16 See Strickland, 466 U.S. at 697 (stating that a court need not address both prongs of ineffective
17 assistance of counsel claims if petitioner makes an insufficient showing on one prong). It simply
18 cannot be said that there is a reasonably likelihood of a different outcome in this case had trial
19 counsel objected to two brief portions of the prosecutor’s closing argument. See Strickland, 466
20 U.S. at 693. The evidence of petitioner’s guilt not only included an identification by the victim
21 who knew petitioner for years, but also a videotape of the assault committed inside the grocery
22 store.³ The defense at trial focused on whether petitioner intended to kill Mr. Kelgard in stabbing
23 him twice and then running away. See Lodged Document No. 6 at 1002 (defense counsel’s
24 closing argument emphasizing that if petitioner “wanted to kill him, he would have killed Mr.
25 Kelgard.”). However, the location of both stab wounds in the chest and face near the carotid

26 _____
27 ³ The court’s finding of deficient performance for the sake of judicial economy is in no way a
28 comment on trial counsel in this case who had the unenviable task of defending a client whose
crime was recorded on video tape.

1 artery and jugular vein, sufficiently indicated an attempt to inflict life-threatening injuries. In
2 this case, the jury took just an hour and a half to review the evidence before finding petitioner
3 guilty of the charged offenses. Lodged Document No. 6 at 1015 (indicating that the jury
4 deliberated between 2:38 p.m. and 4:12 p.m.). Here there is no reasonable probability of a
5 different outcome had counsel objected during closing argument to the prosecutor's asserted
6 misconduct. Thus, reviewing the ineffective assistance of counsel claim de novo for purposes of
7 excusing petitioner's procedural default, the undersigned finds that this claim fails based on lack
8 of prejudice. See Visciotti v. Martel, 862 F.3d 749, 769 (9th Cir. 2016) (joining several circuit
9 courts of appeal in concluding that the AEDPA standard of review does not apply to ineffective
10 assistance of counsel claims used to excuse the procedural default of an underlying claim for
11 relief). Accordingly, petitioner has failed to demonstrate that the procedural default of his
12 underlying prosecutorial misconduct claims should be excused.

13 The only issue remaining for the court to decide is whether petitioner is entitled to relief
14 under the AEDPA liberally construing his ineffective assistance of counsel claim as a free-
15 standing claim for relief. For purposes of AEDPA review, the last reasoned state court opinion
16 on petitioner's ineffective assistance of counsel claim is the California Court of Appeal decision
17 on direct review. See State Lodged Document No. 10. The Court of Appeal rejected the
18 ineffectiveness claims finding that there was no prejudice resulting from counsel's challenged
19 conduct in light of the jury instructions on the burden of proof beyond a reasonable doubt as well
20 as a separate instruction telling the jury to follow the court's instructions if they believe that an
21 attorneys' comments on the law conflicted with the court's instructions. See State Lodged
22 Document No. 10 at 7-9, 11-12. In conducting its prejudice analysis, the state court also
23 emphasized the evidence against petitioner "even if not overwhelming, was stronger than
24 [petitioner] acknowledges." State Lodged Document No. 10 at 11. The California Court of
25 Appeal's decision is not an objectively unreasonable application of the Strickland standard and
26 does not entitle petitioner to relief pursuant to 28 U.S.C. § 2254(d)(1).

27 For all these reasons, the undersigned recommends denying petitioner's first amended
28 application for federal habeas relief.

1 **V. Plain Language Summary for Pro Se Party**

2 Because petitioner is acting as his own attorney in this case, the court wants to make sure
3 that this order is understood. The following information is meant to explain this order in plain
4 English and is not intended as legal advice.

5 The court has reviewed the claims in your amended federal habeas petition as well as the
6 trial record in your case and concluded that the prosecutorial misconduct claims are procedurally
7 defaulted. After reviewing your allegations of ineffective assistance of counsel, the court has
8 concluded that they lack merit and therefore do not excuse the procedural default of your
9 remaining prosecutorial misconduct claims or provide an independent basis for relief. If you
10 disagree with this outcome, you can explain why by filing “Objections to the Magistrate Judge’s
11 Findings and Recommendations” within 21 days from the date of service of this order.

12 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s application for a writ of
13 habeas corpus be denied.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 21 days after
16 being served with these findings and recommendations, any party may file written objections with
17 the court and serve a copy on all parties. Such a document should be captioned “Objections to
18 Magistrate Judge’s Findings and Recommendations.” In his objections petitioner may address
19 whether a certificate of appealability should issue in the event he files an appeal of the judgment
20 in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must
21 issue or deny a certificate of appealability when it enters a final order adverse to the applicant). A
22 certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a
23 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(3). Any
24 response to the objections shall be served and filed within fourteen days after service of the
25 objections. The parties are advised that failure to file objections within the specified time may

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1 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
2 1991).

3 Dated: September 26, 2019



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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